

CERTIFIED FOR PARTIAL PUBLICATION\*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MEPCO SERVICES, INC.,

Plaintiff, Cross-Defendant and  
Respondent,

v.

SADDLEBACK VALLEY UNIFIED  
SCHOOL DISTRICT,

Defendant, Cross-Complainant and  
Appellant;

HARTFORD FIRE INSURANCE  
COMPANY,

Cross-Defendant and Respondent.

D055018

(Super. Ct. No. 37-2008-00086601-  
CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Frederic L.

Link, Judge. Affirmed.

---

\* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part III.A. through E.

Bergman & Dacey, Gregory M. Bergman, Mark W. Waterman and Arash Beral  
for Defendant, Cross-Complainant and Appellant.

Carno & Carlton, Anna M. Carno and Andrew C. Carlton for Plaintiff, Cross-  
Defendant and Respondent Mepco Services, Inc., and for Cross-Defendant and  
Respondent Hartford Fire Insurance Company.

## I.

### INTRODUCTION

Defendant and cross-complainant Saddleback Valley Unified School District (Saddleback) appeals from a judgment entered in favor of plaintiff and cross-defendant Mepco Services, Inc. (Mepco), a general contractor, and cross-defendant Hartford Fire Insurance (Hartford). This case arose from a dispute between Mepco and Saddleback regarding a school modernization project. Mepco bid on the project based on plans provided by an architectural firm that Saddleback had hired, and was eventually awarded the \$1.64 million contract. During construction, Mepco encountered a number of problems that required that it request approval for additional work that it had not originally contemplated based on the plans. Mepco performed the additional work after being directed to do so by representatives of Saddleback. After Mepco completed the additional work, Mepco and Saddleback disagreed as to whether Mepco was entitled to be paid for the work, and whether Mepco was entitled to an extension of time to complete the contract, or instead, would be liable for liquidated damages as a result of the delay.

When Mepco and Saddleback were unable to resolve their disagreements, Mepco sued Saddleback for breach of contract, among other things. Saddleback countersued,

claiming that Mepco had breached the parties' contract, and sought liquidated damages for Mepco's delay in completing the project. Saddleback also sued Hartford pursuant to a performance bond that Mepco had obtained from Hartford, at Saddleback's request, as required by the terms of the contract between Mepco and Saddleback.

After a trial that lasted nearly two weeks, a jury determined that Mepco had fulfilled its obligations under the contract and that Saddleback had materially breached the contract. The jury concluded that Mepco was entitled to recover from Saddleback damages that included a retention payment and a final progress payment that Saddleback had withheld, as well as damages for all of the additional work that Mepco had completed on the project that was outside the scope of the original plans. The jury also determined that Mepco was entitled to recover delay costs.

The trial court entered judgment in favor of Mepco in the amount of \$681,086.55, plus \$189,479.89 in prejudgment interest, \$366,916.63 in attorney fees, and \$208,650.26 in costs on its complaint against Saddleback. The trial court also entered judgment against Saddleback on its cross-complaint against Mepco and Hartford.

Saddleback appeals from the judgment, raising numerous claims of error. Saddleback contends that the trial court erred in (1) allowing Mepco to elicit testimony about its president's financial condition, thereby appealing to the sympathies of the jury; (2) allowing Mepco to recover damages for breach of contract, in the absence of an express written agreement, signed by the Saddleback Board, concerning the work at issue; (3) permitting Mepco to introduce evidence of settlement negotiations between the parties; (4) refusing to allow Saddleback to present all of its theories to the jury, including

a mitigation of damages defense, an offset/credit defense, and an apportionment of liability defense; (5) demonstrating bias against Saddleback in the presence of the jury and permitting Mepco to argue to the jury that Saddleback had destroyed evidence; and (6) awarding attorney fees to Mepco.

We conclude that the trial court erred in permitting Mepco to elicit certain testimony from the president of Mepco to the effect that he had to refinance his home and use his personal credit to pay the subcontractors, and in admitting in evidence a letter that Saddleback sent to Mepco after Mepco had filed suit in which Saddleback agreed that it would pay Mepco for some of the work that Mepco claimed was beyond the scope of the original plans. While we are troubled by the improper admission of Mepco president's testimony regarding the financial impact that this dispute had on him and the letter that Saddleback sent to Mepco after the lawsuit had been initiated, after having thoroughly reviewed the trial record, we conclude that neither of these errors affected the outcome of the trial. It is not reasonably probable that if this evidence had not been admitted, the jury would have returned a verdict more favorable to Saddleback since the record is replete with direct evidence — much of it from Saddleback's own witnesses — that Saddleback breached its contract with Mepco, and that it was liable for the damages that Mepco claimed.

We find no merit to Saddleback's other claims of error, and therefore affirm the judgment of the trial court.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Factual background*

On June 28, 2006, Saddleback awarded Mepco a contract (the Contract) to complete a project known as the Esperanza Modernization & Relocation of Two Portable Buildings (the Project).<sup>1</sup> The Project involved the modernization and improvement of a special needs school located in Mission Viejo, California. Under the Contract, Mepco was to perform construction work (including providing labor, materials, and equipment) in exchange for payment in the amount of \$1,640,000.00. The Contract called for the Project to be completed within 90 days, and included a liquidated damages provision in favor of Saddleback that set liquidated damages at \$1000.00 per day if the work was not completed within the time specified in the Contract .

Saddleback contracted with a project management consulting firm called TELACU to oversee construction of the Project. Saddleback also hired MVE Institutional (MVE) as the architectural firm for the Project.

Construction began on or around July 10, 2006. Shortly after beginning construction, Mepco encountered a number of unforeseen conditions and problems with the plans and specifications that the Project architect had provided. Mepco sent a number of requests for information and change order requests to the Project architect and superintendent through the "Buzzsaw" computer system — a system that Saddleback had

---

<sup>1</sup> Mepco was the second lowest bidder on the Project, but was awarded the Contract after the company that submitted the lowest bid withdrew its bid.

purchased for use in organizing its construction projects.<sup>2</sup> The Buzzsaw system allowed all of the Project participants to upload documents (including daily reports, requests for information, change order requests, and other forms) into one central depository, so that all parties could review the documents and address any questions, concerns, or requests raised by the documents. Elie Abinader, Mepco's president, explained, "[W]e were supposed to have all communication through Buzzsaw."

In addition to encountering unforeseen conditions at the site, Mepco belatedly discovered that certain aspects of the Project plans that Mepco had relied upon in bidding on the Project required approvals or permits from various governmental agencies, and that these approvals and permits had not been obtained before construction began. For example, the plans had not been approved by the Division of the State Architect (DSA), which had to review and approve the entire set of plans to ensure that they met state safety requirements; the County Health Department, whose approval was required for the specialized kitchen areas; the City of Mission Viejo, which is the entity that would issue a permit for a fire line hot tap connection; or the Orange County Fire Authority, whose approval was required for a fire lane. Before these agencies would issue the necessary approvals and/or permits, the plans had to be altered in a number of ways.

Abinader testified in detail about the problems that Mepco encountered in completing the Project. According to Abinader, Saddleback representatives on the Project, including the architect, were slow to respond to Mepco's questions about the

---

<sup>2</sup> It appears that Mepco input 98 requests for information and more than 40 change order requests into the Buzzsaw system.

plans. In addition, Saddleback representatives asked Mepco to perform additional work on the Project — work that was not contemplated in the original plans — after the 90-day completion date. With respect to each change order request that Mepco had input into the Buzzsaw system, Abinader testified as to why the work had been necessary, how the plans failed to account for the additional work, the cost that Mepco proposed for the extra work, and whether Saddleback representatives had authorized Mepco to complete the work pursuant to that proposed valuation method.<sup>3</sup>

Abinader testified as to how the parties undertook change order work under the Contract. Proposed change order work included work that Mepco did not believe was contemplated within the original plans and specifications drawn by the architect but that

---

<sup>3</sup> The Contract identified three possible ways that proposed additional work could be valued. The Contract states, "Value of any such extra work, change, or deduction shall be determined at the discretion of DISTRICT in one or more of the following ways: [¶] (1) [b]y mutual written acceptance of a lump sum proposal from CONTRACTOR properly itemized and supported by sufficient substantiating data to permit evaluation by DISTRICT and ARCHITECT. [¶] (2) [b]y unit prices contained in CONTRACTOR's original bid . . . or fixed by subsequent agreement between DISTRICT and CONTRACTOR. [¶] [3] [b]y cost of material and labor and percentage for overhead and profit ('time and material')."

The distinction between the documentation necessary to support a lump sum proposal as opposed to a "time and material" proposal became relevant to the parties' dispute over payment for the additional work. The witnesses who worked on the Project testified that in implementing this Contract provision, Mepco would propose the additional work in a change order request, and would include a proposal for the cost of the work as either a lump sum or a time and material basis. If a Saddleback representative was going to authorize Mepco to perform the work, that representative would inform Mepco whether the work was to be done pursuant to the lump sum proposal or on a time and material basis. Under the lump sum method, Mepco would not have to provide as much documentation or as detailed records of the hours worked by its employees as would be required if the work were authorized to go forward on a time and material basis.

was necessary in order to properly complete the Project, as well as extra work that Saddleback had specifically ordered during construction.

When Mepco would encounter unforeseen conditions that required additional work or when the architect would request that Mepco perform additional work, Mepco would submit a change order request to Saddleback representatives. Mepco would transmit the change order request to Saddleback by uploading the document into the Buzzsaw system. The architect would receive Mepco's change order request through the Buzzsaw system, and would respond as to whether he was authorizing Mepco to complete the work and, if so, on which payment basis (i.e., on a lump sum payment basis, a time and materials basis, or a unit price basis), if he believed the work was necessary and not within the scope of the Contract. Alternatively, the architect would reject Mepco's request if he believed that the proposed work *was* within the scope of the Contract.

Abinader testified that Saddleback "told us, since day one, that the architect represent[s] the District. He's the one who approve[s] the proposed change order[s]." According to Abinader, the architect would frequently verbally instruct Abinader to proceed with the work, and would tell Abinader that he would "get [his] paperwork later on," such as at the weekly construction meetings, because "that is where everybody is already around the same table."

Abinader explained that the parties believed that under the Contract, Saddleback's superintendent "need[ed] to sign them [the change order requests] up to 10 percent [of the Contract price]," so the architect and project manager would "start accumulating those

change order requests or proposals, because it goes — instead of bringing every change order request to the District for signature on the change order . . . we bring [a number] of them together, and the District will put the cover sheet, which is the change order we saw before, and they call it change order now, which will be [a] set of about 5, 6, 7, 10 change order request[s], or it could be one."

Abinader testified that Saddleback representatives would often verbally instruct him to go ahead and perform the change order work under a lump sum payment method. Abinader said that when he would ask them to give him something in writing, they would tell him that "it's dumb to ask for that."<sup>4</sup> According to Abinader, when he said that he would not perform the work unless he received signed paperwork, the Saddleback representatives told him that if he did not complete the work, he would be in violation of the general conditions of the Contract. Abinader also testified that, with respect to some of the change order work, Mepco had been directed to complete that work by the first project manager on a lump sum basis, but that the second project manager later told Mepco to perform the same work on a time and material basis. As a result, when Saddleback later demanded that Mepco provide Saddleback with more paperwork to support some of the change order requests, Mepco was unable to do so because it had

---

<sup>4</sup> Thomas McKeown, a program manager in the Facilities and Planning Department at Saddleback during the Project, admitted to having forwarded to the architect one of Abinader's e-mails in which Abinader requested written authorization to complete the change order work. In forwarding Abinader's e-mail, McKeown described it as a "dumb letter from Elie."

initially been directed to complete that work on a lump sum basis, and thus, had retained less documentation pertaining to these change orders.

Abinader testified that Saddleback had not paid Mepco for any of the additional work that Saddleback representatives had directed Mepco to complete, despite the fact that Mepco had requested payment on a number of occasions. In addition, Saddleback never agreed to grant Mepco any time beyond the 90 days provided in the Contract to complete the project, which meant that Mepco could be liable for liquidated damages.

Saddleback's original project manager on the Project was Dean Clay. Clay acted as project manager from the start of construction in July 2007 until September 2007. Clay was officially employed by J.E.M. Consulting, a company that TELACU hired. Clay had worked on number of projects for Saddleback in the past.

Clay, a licensed contractor, testified that his duties as project manager were "overseeing the project . . . taking care of change orders that might come through with the subcontractor or the general contractor and . . . seeing that [the contractor is] doing it per the plans." Clay acknowledged that if he gave direction to Mepco on the Project it was the same thing as Saddleback giving direction to Mepco on the Project, and that he had the authority to approve change orders.

According to Clay, Mepco encountered a number of unforeseen conditions while working on the Project that required that Mepco complete additional work that was outside the scope of work identified in the Contract. Clay testified that Mepco was entitled to change orders for this extra work, that Mepco had been directed by Saddleback to perform the work, and that it was his understanding that Mepco was to be paid for this

work. Clay personally gave Mepco verbal authorization to perform extra work while out in the field, and would later "talk to the architect and he issues a written directive for [Mepco] to do that work." According to Clay, Mepco was instructed to proceed with change order work on a lump sum basis for some of the changes and on a time and material basis for other changes.

Clay testified that in his opinion, Saddleback's original architect representative on the Project, Robert Gruspe, was a "pretty weak" architect, in that he "could not make decisions at the job site, and it took him quite a while to get the answers back, and there were several occasions when I had to remind him and kinda push him a little bit that we are waiting too long on some of these answers. Because it was taking him longer than it should be to get some answers back."<sup>5</sup>

In Clay's opinion, during the time that he worked on the Project, Mepco had not caused any delay on the Project; rather, Saddleback had caused delay. Clay was asked his opinion of the quality of the plans for the Project, to which he replied, "They suck," and explained, "That means I don't like them. There [were] too many open ends that couldn't be — if I can't answer it by looking at the plans in the field as a project manager, and they have to go back to the architect, then they suck."

---

<sup>5</sup> Clay later testified that he had informed the architect's firm that he believed the architect was a weak architect, and that he had orally requested that the architect be replaced.

Clay testified that it is the architect's job "to determine what work is in scope or not in scope on a project." When asked, "[U]ltimately . . . who decides to pay a change order — the Board or the School District," Clay replied that he did not know.

Louis Gallegos replaced for Clay as project manager on the Project.<sup>6</sup> Gallegos testified that pursuant to TELACU's contract with Saddleback, TELACU "operate[d] as an owner's representative of the District." Gallegos worked with McKeown during the Project, to oversee construction of the Project. One of Gallegos's responsibilities "was to review those change orders . . . to establish whether they were within the scope of work of the base contract, if they were [a] fair and reasonable price for the work, if there was enough information to evaluate the validity of the change order." Gallegos would confer with the architect and sometimes with Saddleback's program manager and/or the Inspector of Record for the DSA.

Gallegos testified that pursuant to the Contract, the architect was authorized to determine whether the work completed or to be completed was within, or outside of, the scope of the Contract.

As construction on the Project continued past the original completion date, Abinader began to push harder for written authorization for the numerous proposed change orders that Mepco had submitted. In late February 2007, Abinader sent Gallegos an e-mail "asking him to respond to all proposed change order[s]." In response, Gallegos sent an e-mail to Abinader on February 23, 2007, in which Gallegos stated:

---

<sup>6</sup> Clay apparently left the Project before its completion because TELACU discharged J.E.M. Consulting.

"Elie, in response to your e-mail the attached document Mepco Services, Inc., is directed to proceed with change order work in accordance with the contract documents, General Conditions, 59, Change and Extra Work, [i], which clearly states: Disputes over estimate of changes to the contract price and/or contract time. Should the contractor and the District fail to agree on the estimate of any charge or credit to the District and/or additional or reduced time required for proposed changes in the work of any justified delay[,], the contractor, when notified by the District, shall proceed without delay in the changes or extra work and shall pursue the remedies listed under General Conditions Article 57, Disputes. Mepco Services has been directed on several occasions to proceed with change order work in accordance with contract documents. Please be advised that if Mepco Services, Inc., does not immediately proceed as directed, Mepco Services, Inc., will be in violation of their contract and any and all additional costs and/or associated delays will be . . . the direct[] responsibility of Mepco Services, Inc., the responsible general contractor. If you have any questions, feel free to contact me directly."

Gallegos conceded that in this letter, he directed Mepco to proceed with all of the change order work for which Mepco had already received verbal authorization. Gallegos further testified that his understanding of the Contract was that "even if there was a dispute, in terms of time to perform the work, or [a] dispute on the dollar amounts associated with the work, Mepco still had to go forward and do the work."

Later that day, Abinader responded to Gallegos with the following e-mail:

"Louis, I have been trying to contact you but you are not returning the calls. Anyway, per our meeting last week you stated that you are going to respond to all change order requests that are in Buzzsaw by Monday, February 19, 2007, even though it is a holiday. Per the General Conditions, you either direct me to proceed based on T and M, or you could direct me to proceed based on a lump sum, or you could simply direct me not to proceed with the change order and therefore cancel the change order. This already happened before in the change order of the dropped ceiling. The choice is yours. Mepco is not declining to work on any change order, but Mepco will be happy to do any change order when instructed to do so."

Therefore, per [the] General Condition that you are referring to, please go to Buzzsaw and reply to every single change order request. Until you do, as promised many times, Mepco could not proceed with any change order work that has no response . . . from either the architect or the School District. So far, we have change order requests totaling over \$400,000 and no action is being taken from the District part nor from the architect part, who always refers me to contact the . . . School District in this regard."

Gallegos admitted that he recommended that Saddleback approve payment for a number of the change order requests that Mepco had submitted, and that he believed these change orders were legitimate claims for payment. Gallegos also testified that to his knowledge, Saddleback never gave Mepco notice that Saddleback believed Mepco was in violation of the Contract for delaying the project, until October 17, 2007.

Robert Gruspe was the original project manager for the architectural firm MVE. Although Gruspe was not a licensed architect and did not have a certification in drafting architectural plans, he is the person who "developed the plans" for the Project. At MVE, Gruspe worked under the supervision of Robert Simons, a licensed architect. Gruspe testified that he was the architectural project manager for the Project for approximately six months. Gruspe would conduct weekly meetings concerning the Project. Attendees at the weekly meetings included a Mepco representative, a Saddleback representative, the inspector of record for the DSA, and, sometimes, the school's principal.

Gruspe testified that during the time he worked on the Project, he did not receive Mepco's back-up documentation for much of the proposed change order work. As to proposed change order work for which he did receive backup documentation, the documentation was incomplete. However, when presented with labor reports that Mepco

had provided in association with change order requests, Gruspe admitted that a number of the labor reports appeared to be sufficient, and he could not recall any particular change order request for which the supporting documentation had been insufficient.

Gruspe testified that he personally developed the plans for the Project, and stated that he did not know whether Mepco had been provided with a set of plans that had been approved by the DSA before construction began. After being asked on cross-examination to review multiple documents, Gruspe had to admit that he had not received a DSA-approved set of plans as of August 10, 2006 — a month into construction. Gruspe also acknowledged the authenticity of an e-mail that he had sent to Robert Simons, his supervisor, on August 18, 2006, in which he stated that Saddleback was "getting impatient with the design team [i.e., the architecture team] because they are not getting the answers in a timely manner."

Christopher Bradley also worked on the Project as an MVE architect. Bradley was a licensed architect. After Gruspe was taken off the Project, Bradley took over primary responsibility for reviewing Mepco's change order requests. At some point during construction,<sup>7</sup> Abinader sent the following e-mail to Bradley:

"For the last six to eight weeks, I have been hearing that you are meeting with Tom [McKeown] to go over the change orders. [Gallegos], two weeks ago, he promised that he will send us a directive to proceed with all change order[s] based on T and M, or based on us approving a lump-sum amount. During that weekly meeting, you stated that you need back-up. I do not accept this response. All change order requests are in Buzzsaw with all

---

<sup>7</sup> The transcript does not reflect the date of this communication, and the trial exhibit to which Abinader refers in his testimony is not included in the record on appeal.

attachment[s]. These change order requests give the architect the choice to select[] one of the five options, whether to reject the change order[] or to proceed with it, based on approved lump sum or T & M. Some of these change orders go back three months ago. I will not wait any longer. I need you to respond to all these change orders by next Monday, or I will stop working on them. Mepco also has responsibility towards other project[s]. This project that was scheduled to [be] completed in three months is now taking six month[s], maybe more. I need answers on all remaining problems on this project and answers on all C.O.R. by next Monday. Please bring in the electrical engineer along with the engineer for the fire alarm system in order to resolve the problems. Again, Monday, not later. I will not be responsible for any additional delays. I have to start another project on December 15. Please give us some times in order to complete this project."

Bradley responded, "Elie, I just went back into Buzzsaw and looked at the attached ones again. Unless there is an issue with Buzzsaw, you are still missing your back-up which is all your certified payroll for the days appearing in the C.O.R., and your material invoices. These are things that we have been asking for, for the last six to eight weeks. We cannot proceed with the C.O.R.'s until we have this information. If you are having problem[s] posting the[] items in Buzzsaw, please contract Jennifer Gallagos at the District. And send the hard copy to my office." Abinader testified that he had submitted this documentation on more than one occasion in hard copy format.

Bradley agreed that Mepco was entitled to be paid for at least some of the change orders. Bradley also admitted that he had signed a number of change orders in 2006 and early 2007.

Thomas McKeown's job as program manager in the Facilities and Planning Department at Saddleback was "to get with the schools and with architects and engineers

and ultimately with contractors to . . . execute the projects that came under this bond funding [for improvements to all of the schools in the district]."

McKeown testified that there were some change orders that Saddleback "had agreed . . . were legitimate change orders." According to McKeown, "change order work always occurs in construction projects," and was contemplated in the Contract. Clay and Gallegos, as project managers for the district, had a "[c]ertain amount of leeway" or authority to direct change order work.

According to McKeown, "In the normal course of events, in construction projects, the relationship between the owner and the contractor very often results in that contractor proceeding on verbal authorization . . . [and the contractor] assuming that there will be paperwork follow-up [to provide written authorization] for that change order work [at a later time]." "In the ordinary course of things, the paperwork always lags behind," such that the contractor is directed to proceed with the work, performs the work, and "then the change order document that the contractor prepares is signed and paid by the District."

McKeown conceded that, "[T]here were some — some change orders that we had agreed upon that would eventually have turned into paperwork," and Mepco should have been paid for that work "once the paperwork was complete." McKeown testified that it is not necessarily out of the ordinary for the change order process to take nearly a year to be completed, because "[a] lot of times it's getting the paperwork processed amongst the three or four people who all have to see it and agree to it and process it, and finally get it into the chain to get it done." Thus, in the normal course of business, a contractor is often given verbal approval or rejection of a change order request.

McKeown added that if Mepco "presented a lump sum [change order proposal] at the very beginning, and we agreed to that, whether verbally or in writing, then [Mepco] should be paid for it." According to McKeown, the decision making with respect to the change orders was "a team combination." He testified that "[t]he architect, the project manager and sometimes the inspector all have input [in]to those decisions. Primarily the architect, however."

It was McKeown's understanding that the only time change order requests would have to be approved by the Board was if the cost of the potential change orders was going to exceed ten percent of the original contract price.

McKeown, Gruspe, and Bradley all admitted that the architect had issued bulletins<sup>8</sup> for new or additional work after the contemplated completion date for the Project.<sup>9</sup>

Gruspe and McKeown both testified that they did not receive sufficient backup documentation to support payment on some of Mepco's change order work. However, Gruspe acknowledged that there were a number of unforeseen conditions that Mepco encountered upon demolition of the original structures and while performing construction

---

<sup>8</sup> The architect would issue "bulletins" through Buzzsaw to request that Mepco undertake additional work not contemplated by the plans. Mepco would then provide a change order request for that additional work.

<sup>9</sup> The significance of the timing of the bulletins is that it would have been impossible for Mepco to have completed the work requested in the late-issued bulletins within the original 90-day time frame.

pursuant to the plans that required additional work that was not included in the scope of the original Project plans.

Veselin Ninov, the inspector for the DSA (also referred to as the inspector of record (IOR)), testified that there were a number of issues as to which the failure of Saddleback representatives — particularly the representative of the architect — to respond to requests for information (RFIs) or other questions from Mepco, caused construction of the Project to extend beyond the 90-day completion date.<sup>10</sup> It was Ninov's opinion that Gruspe "was lacking decisiveness . . . at certain RFI, certain points of the Project." Ninov also believed that the original plans "were lacking information" and that the quality of the plans was "below average."

Ninov testified that Clay had instructed him not to verify the hours of Mepco's employees with respect to change order work, which meant that there was no independent

---

<sup>10</sup> Ninov testified, "[Y]ou can call [my position as IOR] independent. I am licensed by D.S.A. . . . I was paid by the District, but I . . . report to the architect." Ninov acted as IOR on this Project and on two other projects at the same time. According to Ninov, the role of an IOR is "[t]o inspect and make sure that the project is being built per [DSA] approved plans and specs and code." However, he acknowledged that there was not a DSA approved set of plans "at the beginning of the project." Ninov testified that it is not "normal to start a public school project without being in possession of the D.S.A. approved set [of plans]," and that he was "required to . . . insist on D.S.A. approved plans."

Saddleback eventually received DSA approval for the plans on May 11, 2007 — nearly a year after Mepco submitted its bid on the project based on Saddleback's unapproved plans, and 10 months after construction began. The approval letter from DSA indicated that DSA approval of the plans "as to safety of design and construction" was required "before letting [the term for choosing a contractor from all the bidders and moving forward] any contract for construction."

verification of these hours. However, when Gallegos took over for Clay, Gallegos asked Ninov to begin tracking the hours associated with Mepco's change order work.

Stephen McMahon, assistant superintendent for business services at Saddleback, testified that part of his job was to oversee school modernization projects. McMahon conceded that "[i]f [Mepco] did the work and it's outside the [scope of the] contract, they should be paid." McMahon admitted he had acknowledged in his deposition that a number of the change order requests involved work that was outside the scope of the Contract. McMahon further testified that to determine whether the contractor should be accorded additional time to complete extra work, "the architect and the project manager . . . look at the schedule and . . . say whether time should be allocated or not."

McMahon testified that he believed that, with respect to the delays in the Project, "there is some blame for all parties" involved, and that at least some of the delays were attributable to Saddleback. He also admitted that Mepco "shouldn't be charged liquidated damages" for work that Saddleback requested after the original completion date contemplated by the Contract."

McMahon conceded that Mepco had received authorization to proceed on a number of the change order requests. McMahon testified that in his opinion, the plans for the Project "could have been better." He explained, "Well, judging in my opinion, judging from all the requests for information and — and things that have come up that weren't necessarily identified on the plans that [it] sure would have been a lot better if the plans had had all those things in there."

Dean Vlahos, a partner with the architectural firm WWCOT and director of the firm's forensics department, testified as an expert for Mepco. He expressed his view that the plans that Mepco and other contractors were asked to bid on "never should have been released out on the street for purposes of bidding" because there were "far too many errors" and missing components. With respect to the contractor's obligations under the Contract, Vlahos noted that pursuant to the Contract, "the contractor has to continue building" even when there has been a change to the plan as a result of deficiencies in the drawings or other requests from the owner. Further, under the terms of the Contract, if the contractor and Saddleback disagree over costs for change order work, "[t]he contractor is still obligated to continue working on the project. So the district basically has that contractor over the proverbial barrel here to say whether we agree or we don't agree to the money, keep building, and if you get your money, you get your money, if you don't, you don't, is the way that contract is written."

The Project was not completed until early 2007. Throughout construction and even after completion of the Project, the parties continued to discuss whether Saddleback would allow Mepco additional time, which would ensure that Mepco would not have to pay liquidated damages for any delay, and whether Saddleback would pay Mepco for the additional work that Mepco had completed pursuant to the proposed change orders that Mepco had entered into the Buzzsaw system and had been directed to complete. Mepco was requesting approximately \$300,000.00 for work it had performed that Mepco believed was beyond the scope of the original plans, and an additional \$160,000 in delay costs. Since the parties were unable to reach agreement on a number of matters with

respect to payment and extensions, Saddleback refused to pay Mepco both its final progress payment of \$59,633.55, and the \$164,000.00 retention sum that Saddleback had withheld from prior progress payments.

B. *Procedural background*

On June 26, 2007, Mepco filed an action against Saddleback in which it asserted the following causes of action: (1) breach of written contract; (2) work, labor, and services rendered/agreed price; (3) common count for work, labor, and services rendered – reasonable value; (4) breach of implied warranty of plans and specifications, misrepresentation of plans and specifications; and (5) equitable adjustment for delay and disruption.

Saddleback filed an answer to the complaint on September 14, 2007, and at the same time filed a cross-complaint for breach of contract against Mepco, and breach of the performance bond against Mepco and Hartford Fire Insurance Company (Hartford), the surety that provided Mepco's performance bond.

The trial court denied Saddleback's motion for judgment on the pleadings and its motion to bifurcate legal issues.

The case went to trial on January 21, 2009. The jury rendered a verdict in favor of Mepco on all issues on February 9, 2009. The jury determined that Mepco was entitled to recover the withheld retention amount and the withheld final progress payment, as well as \$154,362.00 in delay damages, and \$303,091.00 for work performed pursuant to the proposed change orders.

The trial court entered an amended judgment in the amount of \$1,446,130.33 in favor of Mepco, on Mepco's complaint, on April 23, 2009. The judgment included \$164,000.00 for the retention amount, \$59,633.55 for the final progress payment, \$303,091.00 for the change orders, \$154,362.00 for delay damages, \$189,476.89 for prejudgment interest, \$366,916.63 for attorney fees, and \$208,650.26 for costs. The court also entered judgment against Saddleback on its cross-complaint against Mepco and Hartford.

Saddleback filed a timely notice of appeal on April 24, 2009.

### III.

#### DISCUSSION

A. *The trial court's allowing Abinader to testify about his financial condition does not require reversal*

Saddleback contends that the trial court committed reversible error in allowing Abinader to testify about his financial condition.

At the close of Abinader's direct examination, counsel for Mepco engaged in the following colloquy with Abinader:

"Question: [H]ave you been — how have you been able to pay all of these costs and suppliers and subcontractors . . . without being paid your contract balance, let alone the change orders?

"Mr. Gregory Berman: Relevancy.

"The Court: Overruled.

"The Witness: Basically, we had to get the second on the house, and maximize our line of credit, in order for us to pay for everybody."

This exchange concluded Abinader's direct examination. After the trial court excused the jury for a break, counsel for Saddleback argued that the final question that Mepco's attorney had posed was "an improper question" designed to elicit an answer "to get the jury feeling sorry for this gentleman." The trial court overruled the objection. When jury returned, counsel for Saddleback began cross-examination of Abinader.

Saddleback also complains that Mepco's attorney referred to Abinader's testimony concerning his precarious financial condition during closing argument, in an attempt to play to the jury's sympathy. The portion of counsel's closing argument with which Saddleback takes issue is the following:

"And you know, this isn't life or death in this case, obviously, but you can have no doubt that your decision is going to affect real lives. Elie's emotions when he was here on the stand are real. His testimony is real. His . . . home financed this project."

Counsel for Saddleback objected that this statement constituted "[i]mproper argument." The court overruled the objecting, stating, "It was in the evidence." Mepco's attorney continued:

"He testified that he put his home – put a second on his home. He maxed out his equity line to finance the District's project. They are enjoying the benefit of his money, his labor."

Saddleback complains that Mepco's counsel "waited again until the very end to try to incite the jurors' emotions and sympathies over Mr. Abinader's theatrical tears and purported financial condition." Saddleback contends that Mepco's attorney's conduct in this regard "was akin to that in *Smellie* [*v. Southern Pacific Co.* (1933) 128 Cal.App. 567, 577], where a party was permitted to testify to their 'poverty and inability to pay for an

education of minor children and the necessity of taking them from school and setting them to work to contribute to the necessary family support.'" Saddleback cites a number of personal injury and wrongful death cases to support its contention that an appeal to a jury's sympathy based on evidence of a party's financial condition constitutes misconduct and is unfairly prejudicial.

The trial court properly concluded that evidence that Mepco, and not Saddleback, had paid all of the subcontractors was relevant to Mepco's damages. However, evidence of Abinader's financial condition was irrelevant to the case and was potentially prejudicial. Although it was proper for Mepco's counsel to ask Abinader whether Mepco had ensured that all of the subcontractors on the Project were paid, the trial court should not have permitted Abinader to testify as to *how* he was able to finance the payments to the subcontractors.

Because the testimony was improper, we must address whether this testimony unfairly appealed to the jury's sympathy, and thereby caused prejudice to Saddleback. (See Code of Civ. Proc., § 475 ["No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed."].) Saddleback contends that any appeal to the sympathies of jurors by way of evidence of

the financial condition of a party taints the verdict and requires reversal. We are not persuaded that reversal is necessary in this case.

Although Mepco's attorney should not have been permitted to elicit testimony from Abinader to the effect that Abinader had to borrow money to finance payment of the subcontractors, there is no basis to believe that this single question and answer, and/or Mepco's attorney's argument based on that exchange, viewed in the context of all of the testimony and other evidence presented this lengthy and complex trial, caused the jury to find in Mepco's favor.

We are firmly convinced that the jury would have found in Mepco's favor even if Abinader had not been permitted to testify that he had to mortgage his home and "max[] out" his line of credit in order to pay the subcontractors. The trial in this case lasted for approximately three weeks. Prior to Abinader's statement regarding how he was able to pay the subcontractors, Abinader had been testifying for *three days*. Abinader remained on the witness stand for many more hours during Saddleback's cross-examination, and on redirect and recross-examination, after he had testified about having to take out a second mortgage and use his line of credit to pay the subcontractors. There is no suggestion that any other portion of Abinader's lengthy testimony was improper. In addition, Saddleback's own witnesses admitted that the plans and specifications that Saddleback provided to Mepco were of poor quality, and that there were a number of problems with the plans — problems that ultimately caused Mepco to have to make a number of adjustments that it could not have foreseen at the time it bid on the project.

Several of Saddleback's witnesses also admitted that a number of the delays were the result of the failure of Saddleback representatives to give Abinader clear direction and/or authorization to complete necessary work. These concessions called into question the credibility of Saddleback's expert witness, who was essentially a Saddleback employee, and who testified that Mepco was responsible for all of the delays and other problems on the Project.<sup>11</sup> In contrast, Mepco presented two independent experts who explained in great detail why the original plans for the Project were deficient and why Saddleback and its agents were responsible for the delays in completing the Project.

Viewed in the context of all of the evidence presented at trial in this case, Abinader's reference to having taken out a second mortgage on his house and to having "maxed out" a line of credit to pay the subcontractors was of minor significance. We conclude that there is no reasonable possibility that the jury would have reached a verdict more favorable to Saddleback if the trial court had precluded Abinader from testifying about how he was able to pay the subcontractors.

B. *The court did not err in allowing Mepco to argue that it could recover for work that it performed that had not been approved in writing by the District's Board*

Saddleback contends that the trial court erred in allowing Mepco to claim that it could recover damages pursuant to "agreements" that were never approved in writing by

---

<sup>11</sup> Although the trial court agreed to allow Saddleback to designate this witness as an expert, the court noted its reservations about doing so: "This has got to be — I want the record to reflect this — the weakest expert I have ever seen in all my years of being a judge and an attorney, I might add, both in criminal and civil. [¶] And it bothers me that he is your employee, full-time, I might add, for a significant period of time."

the District's Board. Specifically, Saddleback argues that both the Contract and California law pertaining to public works projects preclude any theory of recovery other than a theory of breach of an express, written contract. According to Saddleback, the trial court erred in allowing Mepco to recover damages based on equitable theories or oral or implied contracts.

Saddleback claims that the Contract "unequivocally required as a condition of payment that all contract modifications for additional work must occur only through written change orders approved by the Board . . . ." Saddleback asserts that the trial court erroneously allowed Mepco to recover based on "oral contracts entered outside the authority of the District's Board." In making this argument, Saddleback refers to competitive bidding requirements and "the need to protect the public by disallowing claims that would circumvent public entities' procedural requirements for obtaining rights only through validly authorized written contracts." We reject Saddleback's contentions.

At the outset, we note that a significant portion of the damages that Mepco sought from Saddleback were funds that Saddleback owed to Mepco for work that Mepco completed pursuant to the terms of the original Contract. The jury awarded Mepco \$164,000 that Saddleback had withheld as a retention payment, the final progress payment of \$59,633 that Saddleback also withheld, as well as \$154,362 in delay damages. All of these damages derived directly from the terms of the original Contract — and the jury's finding that Saddleback breached the Contract — and did not involve payments for additional or change order work. The only portion of the judgment to which Saddleback's contention that the trial court erroneously allowed Mepco to base its

arguments on oral or implied agreements could apply is the \$303,091.00 in damages that the jury determined Mepco was owed for work it completed that was outside the scope of the original plans.<sup>12</sup>

With respect to work performed pursuant to the change orders that Mepco proposed, Saddleback contends that the Contract required written approval of the Board for change order work, and that Mepco presented only evidence of oral statements and/or the parties' conduct to support its claim that it was owed compensation for the proposed change order work that it completed. However, neither the Contract nor the record supports Saddleback's contentions in this regard.

The Contract is ambiguous as to the procedure that Mepco was to follow to obtain authorization for additional work necessitated by either the poor quality of the plans or requested by Saddleback during construction of the Project, particularly with respect to the contractor's obligations to complete work on the Project. In addition, some provisions of the Contract conflict with others. For example, the Contract is ambiguous with respect to who was authorized to give instructions to Mepco, including instructions to undertake work that was arguably beyond the scope of the original plans. Under "ARTICLE 1. DEFINITIONS," the Contract provides that "Approval means written authorization by ARCHITECT or DISTRICT." There is no limitation of the architect's authority to approve of anything in writing pursuant to this definition. Therefore, in a situation in

---

<sup>12</sup> Saddleback does not acknowledge this distinction in its briefing, and appears to suggest that Mepco's entire recovery in this case was based on an impermissible equitable theory.

which Mepco was required to obtain approval to perform work, it would appear that such approval could come from the architect. In addition, the term "DISTRICT" is defined in the Contract as "the Governing Board *or its duly authorized representative.*" (Italics added.) A number of Saddleback witnesses testified that the TELACU project managers were considered to be Saddleback representatives for purposes of the Project.

Elsewhere in the Contract, under "ARTICLE 8. ARCHITECT'S STATUS," the Contract states that "[t]he ARCHITECT shall be the DISTRICT's representative during construction and shall observe the progress and quality of the work on behalf of the DISTRICT." This provision appears to limit the architect's authority by also providing that "ARCHITECT shall have the authority to act on behalf of DISTRICT only to the extent expressly provided in the Project Documents." However, later in this provision, the Contract grants the architect the authority to give Mepco instructions, and requires Mepco to comply with any instructions from the architect: "The ARCHITECT has the authority to enforce compliance with the Project Documents and the CONTRACTOR shall promptly comply with instructions from the ARCHITECT or an authorized representative of the ARCHITECT." Under this provision, the Contract also gives the architect the authority to make virtually all decisions relating to the construction work: "On all questions related to the quantities, the acceptability of material, equipment or workmanship, the execution, progress or sequence of work, *the interpretation of plans, specifications or drawings*, and the acceptable performance of the CONTRACTOR . . . the decision of the ARCHITECT shall govern and shall be precedent to any payment unless otherwise ordered by the Governing Board. The

progress and completion of the work shall not be impaired or delayed by virtue of any question or dispute arising out of or related to the foregoing matters and the instructions of the ARCHITECT relating thereto." (Italics added.)

At a minimum, the Contract appears to give both the architect and Saddleback's project managers broad authority to make decisions related to the construction of the Project. The Contract also gives the architect the authority to interpret the plans, which would have been necessary each time that Mepco proposed additional work that it believed was outside the scope of the original plans:

*"Questions regarding interpretation of drawings and specifications shall be clarified by the ARCHITECT. Before commencing any portion of the work, CONTRACTOR shall carefully examine all drawings and specifications and other information given to CONTRACTOR. CONTRACTOR shall immediately notify ARCHITECT and DISTRICT in writing of any perceived or alleged error, inconsistency, ambiguity, or lack of detail or explanation in the drawings and specifications. If CONTRACTOR or its subcontractors, material or equipment suppliers, or any of their officers, agents, and employees performs, permits, or causes the performance of any work under the Project Documents, which it knows or should have known to be in error, inconsistent, or ambiguous, or not sufficiently detailed or explained, CONTRACTOR shall bear any and all costs arising therefrom including, without limitation, the cost of correction thereof."* (Italics added.)

The Contract thus clearly gives the architect the authority to make decisions and to advise Mepco concerning any ambiguities in the plans.

The provision that the parties apparently intended to be the most relevant in governing potential changes in the scope of work under the plans — and the provision that the parties relied upon during construction with respect to the proposed change order

work — falls under "ARTICLE 59. CHANGES AND EXTRA WORK." Article 59 is six pages in length, and incorporates a number of different subsections that touch on issues that arise when a contractor must perform work not contemplated in the original plans. This portion of the Contract provides, in pertinent part:<sup>13</sup>

"(a) DISTRICT may, as provided by law and without affecting the validity of this Agreement, order changes, modifications, deletions and extra work by issuance of written change orders from time to time during the progress of the Project, contract sum being adjusted accordingly. All such work shall be executed under conditions of the original Agreement except that any extension of time caused thereby shall be adjusted at [the] time of ordering such change. DISTRICT has discretion to order changes on a 'time and material' basis with adjustments to time made after CONTRACTOR has justified through documentation the impact on the critical path of the Project.

"(b) Notwithstanding any other provisions in the Project Documents, the adjustment in the contract sum, if any, and the adjustment in the contract time, if any, set out in a change order shall constitute the entire compensation and/or adjustment in the contract time due CONTRACTOR arising out of the change in the work covered by the change order unless otherwise provided in the change order. The amount of the compensation due CONTRACTOR shall be calculated pursuant to subparagraph (e) of this Article 59. The entire compensation shall not include any additional charges not set forth in subparagraph (e) and shall not include delay damages (due to processing of a change order, refusal to sign a change order) indirect, consequential, and incidental costs including any project management costs, extended home office and field office overhead, administrative costs and profit other than those amounts authorized under subparagraph (e) of this Article 59.

"(c) In giving instructions, ARCHITECT shall have authority to make minor changes in work, not involving change in cost, and not inconsistent with purposes of the Project. The DISTRICT's

---

<sup>13</sup> Because the provisions of article 59 are at the core of the parties' disputes, we quote it at some length.

Assistant Superintendent of Business Services may authorize changes in work involving a change in cost that does not exceed ten percent (10%) of the original contract amount pursuant to the Public Contract Code Section 20118.4. Otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from DISTRICT, authorized by action of the governing board, and no claim for addition to contract sum shall be valid unless so ordered.

"(d) If the ARCHITECT determines that work required to be done constitutes extra work outside the scope of the Agreement, the ARCHITECT shall send a request for a detailed proposal to the CONTRACTOR. CONTRACTOR will respond with a detailed proposal within five (5) calendar days of receipt of the Request for Proposal which shall include a complete itemized cost breakdown of all labor and materials showing actual quantities, hours, unit prices, and the wage rates required for the change. If the change order involves a change in construction time, a request for the time change shall accompany the change order cost breakdown. All such requests for time shall be specified by CONTRACTOR as either 'work days' or 'calendar days.' Any request for time received with only the designation of 'days' shall be considered calendar days. The term 'work days' as used in this paragraph shall mean Monday through Friday, excluding Saturdays, Sundays, and federal/State of California observed holidays. If the work is to be performed by a subcontractor, CONTRACTOR must include a bid from the subcontractor containing the same detailed information as required for CONTRACTOR. No extensions of time will be granted for change orders that, in the opinion of the ARCHITECT, do not affect the critical path of the Project.

"(e) Value of any such extra work, change, or deduction shall be determined at the discretion of the DISTRICT in one or more of the following ways:

"(1) By mutual written acceptance of a lump sum proposal from CONTRACTOR properly itemized and supported by sufficient substantiating data to permit evaluation by DISTRICT and ARCHITECT.

"(2) By unit prices contained in CONTRACTOR's original bid and incorporated in the Project Documents or fixed by subsequent agreement between DISTRICT and CONTRACTOR.

"(3) By cost of material and labor and percentage for overhead and profit ('time and material'). If the value is determined by this method the following requirements shall apply:

"[¶] . . . [¶]

"(f) If the CONTRACTOR should claim that any instruction, request, drawing, specification, action, condition, omission, default, or other situation obligates the DISTRICT to pay additional compensation to CONTRACTOR or to grant an extension of time, or constitutes a waiver of any provision in the Agreement, CONTRACTOR shall notify the DISTRICT, in writing, of such claim within five (5) calendar days form the date CONTRACTOR has actual or constructive notice of the factual basis supporting the claim. The notice shall state the factual bases for the claim and cite in detail the Project Documents (including plans and specifications) upon which the claim is based. The CONTRACTOR's failure to notify the DISTRICT within such five (5) day period shall be deemed a waiver and relinquishment of such a claim. If such notice be given within the specified time, the procedure for its consideration shall be as stated above in these General Conditions.

"[¶] . . . [¶]

"(h) The Contractor will utilize the Change Order Form included in the Project Manual

"(i) Disputes over estimate of changes to the Contract Price and/or Contract time. *Should the Contractor and the District fail to agree on the estimate of any charge or credit to the District and/or additional or reduced time required for proposed changes in the [w]ork of any justified delay[,] the Contractor (when notified by the District) shall proceed without delay with the changes or extra Work and shall pursue the remedies listed under General Conditions Article 57, Disputes.*" (Italics added.)

Article 57 of the Contract, in turn, provides:

"ARTICLE 57. DISPUTES – ARCHITECT'S DECISIONS

"(a) The ARCHITECT shall, within a reasonable time, make decisions on all matters relating to the CONTRACTOR's execution

and progress of the work. The decisions of the ARCHITECT shall not be binding, but shall be advisory only on the CONTRACTOR *for the purpose of the CONTRACTOR's obligation to proceed with the work.*

"(b) Except for tort claims, all claims by the CONTRACTOR for a time extension, payment of money or damages arising from work done by, or on behalf of, the CONTRACTOR pursuant to the Agreement and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to, or as to the amount of payment which is disputed by the DISTRICT of Three Hundred Seventy Five Thousand Dollars (\$375,000) or less shall be subject to the settlement procedures set forth in Public Contract Code Section 20104, et seq.[,] which provisions are incorporated herein by reference."

*"(c) In the event of a dispute between the parties as to performance of the work, the interpretation of this Agreement or payment or nonpayment for work performed or not performed, the parties shall attempt to resolve the dispute. Pending resolution of the dispute, CONTRACTOR agrees to continue to work diligently to completion. If the dispute is not resolved, CONTRACTOR agrees it will neither rescind the Agreement nor stop progress of the work, but CONTRACTOR's sole remedy shall be to submit such controversy to determination by a court of the State of California, in Orange County, having competent jurisdiction of the dispute, after the Project has been completed, and not before." (Italics added.)*

The "Change Order Form" referenced in subdivision (h) of article 59, which Mepco was to use for the purpose of requesting authorization for additional work, included the following options under the term "Directive:" (1) "Do not proceed with the work. Submit cost proposal for review first;" (2) "Proceed with the work on the basis of the previously prepared cost proposal. Amount approved \$ \_\_\_\_;" (3) "Proceed with the work on a documented T&M basis, per Gen. Condition's req.;" (4) "Proceed with the

work. A lump sum will be negotiated at a later date;" or (5) "Other: \_\_\_\_." <sup>14</sup> Although the form included spaces for the signatures of the architect, contractor, and "OWNER/DISTRICT," the evidence demonstrated that the architect and/or the project manager provided work directives by way of the Buzzsaw system, which involved inputting information into a computer, and that Saddleback representatives would direct Mepco to complete the work proposed in the change order requests through Buzzsaw before the change orders were signed.

A document entitled "CHANGE ORDER BACK-UP INFORMATION" includes spaces for the contractor to identify the materials and labor costs, and also includes spaces for the contractor, the construction manager, the architect, DSA inspectors, and the facilities project manager to mark either "Approved" or "Disapproved" and to sign the form.

Read together, the provisions of the Contract and the forms that Saddleback supplied to Mepco are unclear with respect to how Mepco was supposed to proceed, or whose direction it was supposed to take, regarding additional work that it had to complete either because the plans were insufficient, or because Saddleback representatives requested the extra work. Saddleback points to subdivision (c) of article 59 as supporting its position that the Contract required that "all contract modifications for additional work must occur only through written change orders approved by the Board (i.e., via an

---

<sup>14</sup> The sample of this form contained in the Contract documents did not include the final option of "Other: \_\_\_\_." However, the form that was used in the Buzzsaw system did include "Other: \_\_\_\_" as an optional directive.

express written contract by the contracting authority)." However, not only does subdivision (c) of article 59 not say what Saddleback contends it says, but it also appears to conflict with other portions of article 59, and with other provisions of the Contract.

First, in quoting from the Contract in its briefing, Saddleback conspicuously omits the portion of subdivision (c) of article 59 that might apply to Mepco's change order requests—i.e. a sentence that states, "The DISTRICT's Assistant Superintendent of Business Services may authorize changes in work involving a change in cost that does not exceed ten percent (10%) of the original contract amount pursuant to the Public Contract Code Section 201118.4." Instead, Saddleback provides only the two sentences that frame that sentence—the sentence that discusses the architect's "authority to make minor changes in work, not involving change in cost" and the sentence that immediately follows the omitted sentence, which states "*Otherwise . . . no extra work or change shall be made unless in pursuance of a written order from the DISTRICT, authorized by action of the governing board . . . .*" (Italics added and omitted.) Read in context, the provisions on which Saddleback relies *do not* require that *any* authorization for additional work be made by written change order approved by the Saddleback Board, as Saddleback suggests.

Even with this provision, however, the Contract is ambiguous as to what procedure the parties contemplated would be followed in order for the contractor to be paid for additional work. Two areas of disagreement arise with respect to proposed change order work under the Contract. The first involves whether Mepco was directed to complete the proposed work, and who had the authority to direct Mepco to complete the

work; the second is whether payment for such work was approved, and who had the authority to approve such payment. Although subdivision (c) of article 59 states that the assistant superintendent of business services "may authorize" a contractor to go forward with proposed change order work, it is not at all clear that the assistant superintendent of business services was the only person with such authority. As pointed out above, the Contract suggests that any number of other individuals acting on behalf of Saddleback had the authority to direct the contractor to complete work.

Subdivision (i) of article 59 appears to contemplate exactly the scenario that occurred here: the failure of the parties to agree on a price or time credit for the extra work. That subdivision provides that under these circumstances, the contractor would be required to "proceed without delay with the changes or extra [w]ork," when "notified" by the "District," and that the contractor's only recourse if the parties could not agree on a price for the extra work would be to "pursue the remedies listed under General Conditions Article 57, Disputes." Revisiting the definitions provided in the Contract, the "District" could be either "the Governing Board or its duly authorized representative." Thus, it would not be unreasonable for Mepco to understand that provision to require that it complete the proposed work when directed to do so by anyone whom Saddleback had identified as one of its authorized representatives on the project.<sup>15</sup>

---

<sup>15</sup> The provision regarding disputes reaffirms that the contractor is to complete the work when directed to do so by a Saddleback representative, and to deal with Saddleback concerning payment for that work at a later time. That is exactly what Mepco did here.

Moreover, article 57, which governs disputes between Saddleback and the contractor, provides that the contractor must take direction from the architect, and further provides that when directed to complete work by the architect, the contractor must perform that work, regardless of whether payment for the work is in dispute.

At a minimum, the Contract is ambiguous with respect to who had the authority to direct Mepco to proceed with proposed change order work. Where a contract is ambiguous, parol evidence is admissible to aid interpretation. (*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 920.) The parties' course of dealings may be used to determine the practical construction of the terms. (*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396.) Certainly, evidence of how the parties conducted themselves with respect to change order work was relevant to determining whether Saddleback breached the contract by having its agents authorize or require Mepco to complete work, and later refusing to pay Mepco for that work.

The parties' conduct demonstrates that they understood the Contract to provide for a two-pronged system for dealing with work that was outside the scope of the original plans—one pertaining to authorization to complete the work, and the other pertaining to approval of Mepco's payment requests. The witnesses uniformly described the process that they understood they were supposed to follow pursuant to the Contract as follows:

(1) Through the Buzzsaw system, Mepco would propose additional work that it believed was not covered by the plans, either at the behest of the architect, or on its own because it had run into a problem with the plans, and Mepco would propose to do the work either for a lump sum, or on a time and material basis; (2) the architect and project manager

would review Mepco's proposal and would either authorize Mepco to proceed with the work (agreeing to either the lump sum proposal or informing Mepco that the proposed work would have to be done on a time and material basis), or would instruct Mepco not to do the work; (3) after Mepco completed the work, Mepco would submit bills for the work; (4) the project manager would review the documentation that Mepco submitted with its bills and decide whether the payment request was sufficiently supported by the documentation; (5) the project manager and Mepco would discuss whether certain payment requests should be amended; and (6) with respect to payment requests that Saddleback representatives believed were reasonable and sufficiently supported, McKeown would gather a number of change order requests to take to the Board for signature. This final step was considered to be a formality required in order for payment to be issued to Mepco.

Under an interpretation of the Contract that required Mepco to complete work that either the architect or the project manager directed Mepco to perform, Mepco's recourse under the Contract if Saddleback refused to pay for that work was to utilize the dispute process, which contemplated that Mepco would file a lawsuit to recover what it believed it was owed. What the Contract did not permit Mepco to do was to delay the Project while awaiting approval of its payment request. In fact, it was Saddleback's representative on the Project, Gallegos, who directed Mepco to perform all of the proposed change order work, and threatened that if Mepco failed to do the work, *Mepco* would be in breach of the Contract.

The jury's award of damages for the additional work that it found was not within the scope of the original plans could also be based on an implicit finding that Saddleback breached a provision in the Contract that required that the plans that Saddleback provided would be sufficient to enable a contractor to properly bid on and complete the work:

"Drawings and Specifications are intended to delineate and describe the Project and its component parts to such a degree as will enable skilled and competent contractors to intelligently bid upon the work, and to carry said work to a successful conclusion." The jury was instructed to determine whether Saddleback had done everything that it was required to do under the Contract. The jury could have determined that the plans that Saddleback provided to Mepco were of such poor quality that they did not enable Mepco to intelligently bid on the Project or to successfully complete the Project without incurring additional costs and delays from having to perform additional work. Such a finding could also support the damages that the jury awarded Mepco for the additional work it completed on the Project.

To the extent that Saddleback contends that the trial court erred in instructing the jury with respect to oral contracts, including an instruction that "[o]ral contracts are just as valid as written contracts," and that a "contract in writing may be modified by an oral agreement to the extent the oral agreement is carried out by the parties," even if giving these instructions was error, it was not prejudicial. The evidence clearly demonstrated that Saddleback representatives directed Mepco, *in writing*, sometimes multiple times, to proceed with the proposed change order work. Gallegos formally directed Mepco to proceed with the proposed change order work and threatened to claim that Mepco was in

breach of contract if it refused to proceed. In addition, the architect directed Mepco, through Buzzsaw, to move forward with the work identified in Mepco's change order requests. The evidence overwhelmingly showed that Mepco stopped performing extra work because it was not receiving written authorization from any Saddleback representative to complete the work. It was only after Mepco received written authorization through various e-mails and/or documents in the Buzzsaw system, and was threatened with a lawsuit for breach of contract, that Mepco proceeded to complete the construction and to undertake all of the additional work that was required either as a result of the defective plans, or because Saddleback wanted the work done.<sup>16</sup>

In view of the ambiguities in the Contract, the jury could have reasonably determined that Mepco had done everything that was required of it under the Contract with respect to the proposed change order work, and that Saddleback had breached the Contract by failing to fulfill its obligation to pay Mepco for work that Saddleback representatives had authorized.

C. *The trial court's allowing in evidence a letter from Saddleback to Mepco indicating that Saddleback had previously agreed to pay Mepco for work completed pursuant to some of Mepco's change order requests was improper, but does not require reversal*

Saddleback contends that the trial court erred in allowing Mepco to introduce in evidence a letter from Saddleback to Mepco, dated September 5, 2007 (the September 5 letter), in which Saddleback agreed to pay Mepco for some of the change order work that

---

<sup>16</sup> Further, the special verdict form specified that the only contract at issue, and the only contract about which the jury was making findings, was the "Esperanza Contract."

Mepco had completed. According to Saddleback, this letter summarized negotiations that Saddleback and Mepco had entered into in an attempt to resolve the parties' dispute over payment for the change order work, and therefore, should not have been admitted at trial, pursuant to Evidence Code section 1152, subdivision (a).

1. *Additional background*

The September 5 letter was addressed to Abinader and was signed by McMahon and Gallegos. The letter began:

"The Saddleback Valley Unified School District wishes to inform you that as discussed at the meeting with Mepco Services, Inc. and its counsel held on August 14, 2007, please find the following comments concerning the status of numerous Requests for Change Orders ('COR's' or 'RCO's') related to the above referenced project. As discussed, these items are addressed in 2 separate categories: 1) RCOs that the District has agreed, in good faith, to process subject to the appropriate language on each RCO reserving the District's and Mepco's respective rights (further discussed below); and 2) RCOs the [D]istrict cannot approve at this time because the District believes such work is in Mepco's scope under the Contract and/or because Mepco has failed to provide required information to the District."

The letter proceeded to identify 19 change order requests as having been approved for payment. The remaining 21 change order requests were identified either as having been rejected or as requiring additional documentation before Saddleback would approve payment. The September 5 letter thus essentially organized the change order requests into three categories: (1) change order requests that Saddleback agreed to pay, subject to a reservation of rights; (2) change order requests for work that Saddleback agreed was outside the scope of the Contract, and that it might pay if Mepco provided additional documentation to support the request; and (3) change order requests that Saddleback

believed involved work that was within the scope of the Contract, and thus, no additional payment was required.

Gallegos testified that he prepared the September 5, 2007 letter, and that he and McMahon, the at Saddleback, both signed the letter. According to Gallegos, he drafted the letter after Saddleback representatives and its counsel had met with Mepco and its counsel to attempt to resolve the outstanding payment issues pertaining to the pending change order requests. Gallegos testified that at that meeting, the parties agreed that Saddleback would process the change order requests identified as "approved" but that each party would reserve its rights with respect to delay issues (i.e., Saddleback would retain its right to seek liquidated damages from Mepco, and Mepco would retain its right to seek approval of additional time for the extra work). Gallegos included with the letter copies of the change order requests that the architect had signed, and requested that a Mepco representative sign the documents, after which Saddleback would continue to process them for payment, including obtaining Board authorization for payment.<sup>17</sup>

Prior to trial, Saddleback filed a motion in limine in which it sought to exclude the September 5 letter. During arguments about the parties' various motions in limine, the trial court asked the attorneys when settlement negotiations had begun. In response, Mepco's attorneys indicated that mediation between the parties had begun in March 2008. Counsel for Saddleback stated that the parties had engaged in formal mediation in March 2008, but that there had been "informal talks going on during this September [2007] and

---

<sup>17</sup> No Mepco representative ever signed the change order requests that were included with the September 5 letter.

[the] period [before September]." The court responded, "Mediation is in March. This letter is in September. What do you mean informal talks, that is not mediation."

Saddleback's attorney reiterated that "[t]here were informal talks going on" that had resulted in an agreement between the parties, but that Mepco had subsequently backed out of the agreement. Counsel for Saddleback further argued, "I don't see how they can be allowed to use this letter when they backed out of something that they agreed to and say well we agreed to — we backed out but we still want to use the [letter]."

After further discussion about whether Mepco would be permitted to introduce the September 5 letter at trial as evidence of "some kind of agreement" — which the trial court stated it would not allow — counsel for Mepco raised the issue that Saddleback raises on appeal, stating, "[T]hey want to claim the letter out [*sic*] claiming it's some sort of mediation privilege or some sort of settlement discussion." The court responded, "No. The letter in September is not in the mediation process." After further discussion, the court ultimately determined that it would permit Mepco to introduce the September 5 letter in evidence at trial.

## 2. *Legal standards*

"Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."

(Evid. Code, § 1152, subd. (a).) We review the trial court's ruling regarding the

admission or exclusion of evidence under Evidence Code section 1152 for abuse of discretion. (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 32 (*Caira*).)<sup>18</sup>

"[T]he purpose of section 1152 [is] to promote candor in settlement negotiation[s] . . . ." (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 297 (*Warner*).) Evidence should be excluded pursuant to Evidence Code section 1152 in situations in which "the strong public policy favoring settlement negotiations and the necessity of candor in conducting them combine to require exclusion . . . ." (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 13.)

The admission of evidence that should have been excluded necessitates reversal only where it results in prejudice to the complaining party. A court's error in erroneously admitting evidence may be harmless if (1) the evidence "was immaterial or of so little materiality or value that it could not have had any substantial influence on the result;" (2) "though material . . . [the evidence] was merely cumulative or corroborative of other evidence properly in the record," or (3) "though material, and not merely cumulative, [the evidence] was not necessary, the judgment being supported by other evidence." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 430, p. 485.)

---

<sup>18</sup> Although the *Caira* court determined that a trial court's *exclusion* of evidence pursuant to Evidence Code section 1152 is reviewed for an abuse of discretion (*Caira, supra*, 126 Cal.App.4th at p. 32), we see no reason why a different standard should apply when the court has ruled that evidence is not excludable pursuant to Evidence Code section 1152.

### 3. *Analysis*

#### a. *The admission of the September 5 letter was error*

Citing *Warner, supra*, 2 Cal.3d 285, Saddleback contends that the trial court should have excluded the September 5 letter pursuant to Evidence Code section 1152, and that the admission of the letter at trial caused a miscarriage of justice.

In *Warner*, the parties involved in the construction of a public works project disagreed as to the need for a change order. In February 1965, the plaintiff contractor notified the City of Los Angeles that it was unwilling to continue work on a construction project without a change order. (*Warner, supra*, 2 Cal.3d at p. 296.) In response to the contractor's notification, the City of Los Angeles sent the contractor a letter rejecting the contractor's assertion that a change order was required. (*Ibid.*) After the contractor sent another request, the president of the board of public works sent the contractor a letter authorizing the proposed work and indicating that the city would assume the additional cost of the work. (*Ibid.*) The secretary of the board sent a letter confirming that a change order would be issued. (*Ibid.*) In the meantime, the contractor discovered that the additional work would cost more than originally estimated and notified the city of the cost. The city never issued a change order for the original cost estimate, and rejected the new, higher estimate. (*Ibid.*)

The trial court allowed the plaintiff contractor to introduce in evidence both of the approval letters. The City of Los Angeles objected on a number of grounds, including Evidence Code section 1152. (*Warner, supra*, 2 Cal.3d at p. 296.) On appeal, the contractor argued that the correspondence could have been properly admitted "to show

the contemporaneous and practical construction of the contract." (*Ibid.*) The Supreme Court rejected this argument, noting, "The principle of 'practical construction' applies only to acts performed under the contract before any dispute has arisen." (*Id.* at pp. 296-297.) According to the court, by the time the City of Los Angeles notified the contractor that it did not believe a change order was necessary, "the parties had reached a stage of clear disagreement on the crucial question whether plaintiff was entitled to a change order." Accordingly, "[a]nything said in negotiations after that date could not be admitted under the rule of practical construction." (*Id.* at p. 297.)

As in *Warner*, the September 5 letter was created after Mepco had initiated litigation against Saddleback, and it could have led to a settlement that would have eliminated the need for further prosecution of this case. The letter appears to have been prepared in the course of settlement negotiations between Mepco and Saddleback in their attempt to reach agreement as to Mepco's entitlement to payment for additional work that Mepco had performed on the Project. Pursuant to the holding in *Warner*, the trial court should not have admitted the September 5 letter in evidence.

b. *The admission of the letter does not require reversal of the judgment*

Because it was error to admit the September 5 letter, we must consider whether admission of the letter was so prejudicial to Saddleback that reversal is required. Saddleback contends that admission of the letter was unfairly prejudicial for two reasons: (1) the letter served as direct evidence of Mepco's entitlement to be paid for the change order work, and (2) the letter made Saddleback appear to be a bad actor that was

"blameworthy for 'reversing' its settlement position during trial." We reject both of these contentions.

- (i) *There was substantial evidence, apart from the September 5 letter, that established that Saddleback authorized Mepco to complete the change order work and that Saddleback knew that the work was outside the scope of the Contract*

In contrast to the letters that were at issue in *Warner*, which the Supreme Court identified as being "the most convincing evidence presented on [the] question [whether the plaintiff was entitled to a change order to permit use of rotary mud]," a review of the record makes it clear that the September 5 letter was not the most convincing evidence presented at trial concerning the questions that the jury was asked to decide. Specifically, the jury was asked whether Mepco had substantially complied with all of the terms of the Contract, and, if so, whether Saddleback had met its obligations under the Contract. In other words, the jury had to decide whether one or both of the parties were in breach. With respect to the disputed change order work, resolution of this question involved determining whether Mepco had completed the additional work pursuant to authorization by Saddleback under the terms of the Contract, and whether the work was in fact outside the scope of the original plans and specifications such that Mepco was entitled to be paid for that work.

The September 5 letter was of limited evidentiary value with respect to these issues. Although one could view the letter as indirect evidence that Saddleback had previously conceded that its representatives had authorized Mepco to complete at least some of the work that Mepco had proposed in the change order requests, there was

substantial *direct* evidence that Saddleback agents had directed Mepco to perform the work that Mepco identified in its numerous change order requests, and this direct evidence was introduced at trial independent of the September 5 letter. Specifically, Saddleback's various architectural representatives, as well as the two TELACU project managers who acted as agents of Saddleback for purposes of the Project, admitted during their testimony that in response to Mepco's change order requests, Saddleback representatives had directed Mepco to complete the proposed extra work. Further, there was documentary evidence that Saddleback representatives had authorized Mepco to complete the change order work through the Buzzsaw system, as well as evidence that Gallegos had instructed Mepco to complete the proposed work, in writing, despite the fact that the parties had not reached agreement regarding payment for the work. Finally, the Contract clearly contemplated that Mepco would be required to complete the work even if the parties had not reached agreement as to payment for the work, and that Mepco would later have to negotiate with Saddleback over any dispute as to the value of that work at a later point in time.

Viewed in the context of the extensive trial testimony concerning the change order work and the pertinent portions of the Contract, the September 5 letter, in which Saddleback offered to pay for some of the work that Mepco had proposed in its change order requests, constituted cumulative, indirect evidence that Saddleback agents had authorized Mepco to proceed with some of the additional work. There was substantial and significant direct evidence that Saddleback had authorized — in fact, required — Mepco to perform the work proposed in the change order requests, which clearly would

have been introduced at trial regardless of whether the September 5 letter was or was not admitted in evidence.

To the extent that Saddleback contends that admission of the September 5 letter was prejudicial because the jury was permitted to rely on that letter to determine that some of the work proposed in the change order requests was in fact within the scope of the plans, we reject this contention. A central issue that the jury was asked to decide at trial was whether the work identified in the change order requests *was* in fact within the scope of the Contract (and thus covered by the original Contract price), as Saddleback claimed, or rather, whether the work *was not* within the scope, as Mepco maintained. The September 5 letter did provide evidence that Saddleback had previously agreed that at least some of the proposed change order work was outside the scope of the original Contract and that Mepco was entitled to be paid for that work. Specifically, the letter suggested that at one point in time, Saddleback had agreed to pay Mepco additional money for some of the proposed change order work, and that it had rejected Mepco's claims for payment for other proposed change order work, based on whether Saddleback believed the work was within or outside the scope of the plans.

The record demonstrates that in this respect, too, the September 5 letter was merely cumulative of other evidence concerning the scope of work issue — evidence that was quite damaging to Saddleback — and that the admission of the letter was thus not unfairly prejudicial. Saddleback's own agents admitted that virtually all of the work identified in the September 5 letter as having been approved for payment, was work that was outside the scope of the Contract. Saddleback witnesses even admitted that the work

identified in the September 5 letter as having been approved as to substance (but requiring additional documentation) was work that was beyond the scope of the Project plans. In other words, at trial, Saddleback representatives admitted that they believed that the majority of Mepco's claims for payment for proposed change order work were legitimate. Mepco's counsel would have been able to elicit these admissions at trial regardless whether the September 5 letter had been admitted in evidence, since the testimony was not based on what the letter said, but, rather, was based on the witnesses' independent opinions about the work that Mepco had completed and the scope of the plans.

Further, at least 15 requests for change orders that had been signed by Bradley, the architect, as of June 14, 2007 — i.e., months before the September 5 letter was sent, were introduced in evidence. Bradley admitted to having signed some of these requests — even some that were not identified in the September 5 letter as having been approved for payment, as early as 2006 and February 2007.<sup>19</sup> The jury also saw a summary report of the proposed change orders that Saddleback representatives had apparently used to organize and track their responses to the various change order requests, with no objection from Saddleback.<sup>20</sup> This report included handwritten notations that demonstrated that Saddleback representatives intended that Mepco be paid for nearly all of the work that Saddleback identified in the September 5 letter as work for which it would agree to pay.

---

<sup>19</sup> Bradley signed some change order forms multiple times.

<sup>20</sup> At trial, Bradley identified this document as "a list of the change order . . . items."

In addition, various e-mails that were admitted in evidence further demonstrated that the architect had determined, well before the September 5 letter was sent, that various change order requests involved work that was outside the scope of the plans, and that the architect had given approval to Mepco to complete the work. All of this evidence demonstrated that the proposed change order work was in fact outside the scope of the plans; Mepco would undoubtedly have introduced all of this evidence even if the court had excluded the September 5 letter. The September 5 letter was, in essence, a summation of the same positions that Saddleback had taken with respect to the change order requests for many months, and was cumulative of other, more direct evidence.

- (ii) *The letter was merely cumulative of other evidence that demonstrated that Saddleback had originally agreed to pay Mepco for at least some of the work but had backtracked from that position*

Saddleback argues that the prejudice arising from the implication that Saddleback was somehow engaging in wrongful conduct by denying Mepco's entitlement to payment for this work at trial after having apparently agreed to pay Mepco for some of the work in the September 5 letter, requires reversal. Specifically, Saddleback maintains the letter made it appear to the jury that Saddleback was the "bad guy" in this situation, and that Mepco was the "good guy." Under other circumstances, the admission of such a letter would likely require reversal because the substance of the letter goes to the core issues in the case and makes it appear that the defendant is backtracking on what it previously agreed to do. However, in the particular circumstances of this case, admitting the letter in evidence was not unfairly prejudicial because Mepco would have been able to make the

same argument about Saddleback having backtracked on its prior agreement to pay Mepco for the change order work based solely on the trial testimony of Saddleback's own witnesses and other documentary evidence that was introduced at trial, independent of the September 5 letter.

The testimony of Saddleback's witnesses, and other evidence, established what the September 5 letter suggested — i.e., that Saddleback had agreed that it wanted extra work to be done and had acknowledged that the work was not within the scope of the Contract, and that Saddleback had essentially approved Mepco's cost proposals for that work but later refused to pay Mepco for any of the work. The record is replete with evidence that Saddleback essentially forced Mepco to complete work that was not included in the architectural plans, and later refused to pay for this work despite not only having authorized Mepco to perform the work, but also having threatened Mepco that it would be in breach of the Contract if it failed to perform the work. In addition, by virtually all accounts — including the accounts of Saddleback representatives on the Project — the Project plans were incomplete and deficient from the outset. In light of the entire record, and particularly in light of the admissions made by Saddleback witnesses at trial, we conclude that it is not reasonably probable that the jury would have reached a result more favorable to Saddleback if the court had excluded the September 5 letter.

D. *The trial court did not err in rejecting Saddleback's proposed jury instructions and special verdict questions that Saddleback claims would have reduced the amount of the damages that the jury awarded to Mepco*

1. *The trial court did not prevent the jury from hearing Saddleback's "mitigation of damages" defense*

Saddleback contends that the trial court "refused to allow the District to present its mitigation of damages theory to the jury for factual determination." Included in the evidence that Saddleback cites as demonstrating that Mepco failed to mitigate its own damages is evidence that Mepco (1) performed work on a sidewalk without waiting for direction, and that as a result, the work had to be redone; (2) failed to work on other parts of the Project when there were delays; (3) spent too much time on certain aspects of the Project; (4) caused some of the delays itself; (5) did not proceed as rapidly as it could have and failed to manage the Project "better"; (6) took too long to submit proper requests for change orders and backup documentation; and (7) failed to keep enough personnel on site.

Saddleback maintains that the trial court's refusal to give a specific jury instruction on mitigation of damages meant that the jury was precluded from considering whether Mepco, itself, was responsible for some of the damages that it incurred. However, the entire trial was about which party was at fault for the delays and extra work that was necessary in order to complete the Project. The jury was asked to determine whether Mepco was to blame for any of the extra work that had to be done, or for any of the delay in completing the Project. The jury clearly responded that it did not believe that Mepco was to blame for any of the problems that had resulted in extra work or delay. There was

no need for a specific mitigation instruction, since any question of mitigation was necessarily included in the questions that the jury was asked to decide.

2. *The trial court did not err with respect to Saddleback's offset/credits defense*

Saddleback contends that the trial court erred in "refusing to allow the District to present its theory that Respondent's claimed damages should be offset by certain credits." We reject this contention, as well.

The trial court clearly allowed Saddleback to argue that it was entitled to certain credits, and permitted Saddleback to offer evidence regarding the credits to which it claimed it was entitled. The jury heard evidence that certain witnesses believed that Saddleback was entitled to credits under the original contract for work that Mepco never in fact had to complete and/or for materials that Mepco had included in its bid but ultimately did not have to use. The jury instructions and the special verdict form allowed the jury to consider this evidence in calculating the amounts it believed Saddleback owed to Mepco. Neither the jury instructions nor the special verdict form indicated to the jury that it should not consider potential credits to which Saddleback might be entitled.

The special verdict permitted the jury to calculate, based on all of the evidence, the amount of money to which each party was entitled as a result of the delays and extra work required on the Project, pursuant to the Contract. In other words, the jury was permitted to reduce the award of damages to Mepco by the amounts to which the jury believed Saddleback was entitled as credits under the original Contract. If the jury believed that Mepco had not provided a particular service or materials contemplated

under the Contract, the jury was free to deduct amounts for those services or materials in its calculation of damages. The fact that there was no specific special verdict question regarding potential credits to which Saddleback might be entitled did not mean that the jury was prevented from considering whether some of the damages that Mepco was claiming should be offset by credits that Saddleback was claiming.

3. *The trial court did not err with respect to Saddleback's apportionment of liability defense*

Saddleback asserts that the trial court erred in "refus[ing] to give the[] instructions and questions to the jury regarding apportionment of responsibility" for Mepco's damages that Saddleback proposed. Saddleback complains that the special verdict question concerning delay damages asked only whether Mepco was "entitled to any delay damages" from Saddleback, and did not ask the jury to apportion the delay damages among the parties whom Saddleback claims were potentially responsible — parties that Saddleback identifies as Mepco, itself; MVE, the architects who developed the plans; and TELACU, the construction management company that oversaw the Project.

Saddleback contends that the facts in this case are similar to those in *Jasper Constr., Inc. v. Foothill Junior College Dist. Of Santa Clara County* (1979) 91 Cal.App.3d 1 (*Jasper*), disapproved on other grounds in *Los Angeles Unified School District v. Great American Ins. Co.* (2010) 49 Cal.4th 739. Based on *Jasper*, Saddleback argues "that the jury should have apportioned responsibility," and that it was error for the trial court to have "disallowed the jury to apportion responsibility for the claimed delays."

The scenario in *Jasper* is entirely different from the scenario in this case. In *Jasper*, the trial court had instructed the jury that if it found "that *any* delay on the project was caused by" the defendant, then the defendant could not withhold any liquidated delay damages from the plaintiff. (*Jasper, supra*, 91 Cal.App.3d at p. 13.) The jury was also specifically told that it "could not apportion the liquidated delay damages between [the] parties." (*Ibid.*) Significantly, the issue in *Jasper* was whether the jury could apportion liquidated damages between *the parties to that action* — not whether the jury could apportion damages among parties to the action *and non-parties*. In addition, the question of apportionment of liquidated damages in *Jasper* was based on particular language in the contract between the contractor and the public entity that allowed for apportionment of liquidated damages between the two parties. (*Id.* at p. 14.) Thus, the apportionment at issue in *Jasper* involved only parties to the contract at issue, whereas in this case, Saddleback wanted to apportion damages among entities who not only were not parties to this action, but also were not parties to the contract that forms the basis of this action.

Saddleback also relies on *Nomellini Construction Co. v. State of California ex rel. Dept. of Water Resources* (1971) 19 Cal.App.3d 240 to argue that "where delay damages are at issue in a public works construction dispute, there must be an allocation of responsibility to determine the delay damages recoverable." Saddleback again fails to recognize the fact that, like the court in *Jasper*, the *Nomellini* court was discussing apportionment of fault between two contracting parties. There is no suggestion in *Nomellini* or *Jasper* that in a breach of contract action between a contractor and a public

entity over a public works project, the trial court must allow apportionment of fault to non-parties to the contract who may have played a role in the project.

The jury was clearly permitted to apportion fault for the delay in completing the Project between Mepco and Saddleback, which is all that *Nomellini* and *Jasper* require. Unlike in *Jasper*, the trial court in this case did not instruct the jury that a party could not be awarded damages resulting from delay if it was found to have caused some of the delay itself. Thus, the jury in this case was free to determine that Saddleback was entitled to some liquidated damages from Mepco if it found that Mepco had caused some of the delay. In addition, the jury could have reduced the amount of delay damages to be awarded to Mepco by an amount that it believed represented the cost of the delay attributable to Mepco. The trial court did not erroneously limit either party's ability to obtain damages based on delay.

Neither *Nomellini* nor *Jasper* supports Saddleback's position that the trial court should have allowed the jury to apportion contractual delay damages to entities that were neither parties to the Contract nor parties to the action. Saddleback has offered no other authority to support its contention that the trial court erred in not permitting the jury to apportion delay damages to third parties, and therefore has failed to meet its burden to demonstrate error in this regard.

E. *Neither the trial court's permitting Mepco to argue that Saddleback had destroyed evidence, nor comments that the trial court made throughout the trial, prejudiced Saddleback*

Saddleback contends that it was prejudiced by the trial court's instructing the jury concerning spoliation of evidence, and by the manner in which the trial court dealt with

its counsel during trial. With respect to the spoliation instruction, Saddleback complains that "[i]n another blow of bias against the District, the trial court gave Respondent's proffered jury instruction on spoliation of evidence, which allowed Respondent to argue the unjustifiable inference that the District knowingly destroyed evidence. Saddleback maintains that it was not given "a fair opportunity" to present evidence and argument on the issue. Saddleback further argues that in addition to prejudicing the jury against it by suggesting that it had engaged in illegal activity (i.e., the destruction of evidence), the trial court made "numerous comments throughout trial that indicated that the trial court favored Respondent and had disdain for the District." Saddleback cites 21 instances in the trial record that it claims demonstrate the trial court's bias against it.

We first dispose of Saddleback's claim that the trial court indicated a bias against it at trial. A full review of the record reveals no indication that the trial court conducted itself in a manner that demonstrated that the court favored Mepco or that it disfavored Saddleback. In fact, many of the instances that Saddleback cites as suggesting a bias against Saddleback actually appear to be instances in which the trial court was engaging in friendly banter with Saddleback's counsel — which a jury could view as indicating familiarity, not disdain. Further, Saddleback simply mischaracterizes a number of the incidents, failing to acknowledge the context in which they occurred and suggesting a sinister motive for which there is simply no basis in the record.

We also reject Saddleback's contention that the trial court unfairly permitted the jury to draw an inference that Saddleback had destroyed relevant evidence without providing Saddleback an opportunity to present evidence that it had not in fact destroyed

such evidence. Mepco first raised this issue in a motion in limine.<sup>21</sup> Mepco filed a motion in limine in which it sought to exclude evidence pertaining to liquidated damages as a discovery sanction for Saddleback's destruction of evidence.

During discussion of this motion, it became apparent that the evidence in question involved daily reports that Mepco alleged had been created by Saddleback's project managers. As stated earlier in this opinion, Saddleback subscribed to the Buzzsaw computer software system to maintain and store all of the documents related to the Project. During discovery, Clay, the original project manager, testified that he maintained daily reports on the Buzzsaw system. Gallegos, who replaced Clay, stated that he did not maintain such reports. Mepco requested from Saddleback all of the documents related to the Project that were maintained on the Buzzsaw system, but it was never provided with any daily reports created by any Saddleback representative.

A Buzzsaw representative stated in a declaration that Buzzsaw records showed that someone had logged in under the name Jennifer Gallagos,<sup>22</sup> and had deleted a number of items called "daily reports" on multiple days, many months after Mepco had

---

<sup>21</sup> Saddleback fails to acknowledge that this subject was discussed at length before trial when it states in its briefing, "[T]he record demonstrates that the trial court had already made up its mind to condemn the District on this topic before the first witness was called at trial." What the record demonstrates is that the trial court had ruled with respect to this evidence prior to trial. It is disingenuous for Saddleback to suggest that the trial court's later rulings on the matter suggest that the court was acting out of bias, rather than pursuant to a prior ruling.

<sup>22</sup> There were apparently two individuals working on the Project with the last name Gallegos—Jennifer Gallegos and Louis Gallegos. There is no indication in the record that these two individuals are related.

initiated this lawsuit. Jennifer Gallegos worked for TELACU, Saddleback's project management agent, and was identified in the Buzzsaw system as "Site Admin."

The trial court denied Mepco's motion to exclude evidence pertaining to liquidated damages, but indicated that Mepco would be permitted to ask Saddleback witnesses about the alleged destruction of evidence. The trial court also ultimately instructed the jury that it could "consider whether one party intentionally concealed or destroyed evidence."

Saddleback complains that Mepco's introduction of evidence that daily reports had been deleted from the Buzzsaw system, together with Mepco's counsel's statements in closing argument to the effect that Saddleback had deleted important documents, "improperly tainted the jury towards the conclusion that the trial court had reached before the first witness was called." According to Saddleback, "This taint, painting the District as having engaged in illegal activity, certainly colored the jurors' perception of the District and its witnesses on all issues."

In making this argument, Saddleback fails to acknowledge that its counsel was given the opportunity to present evidence to rebut Mepco's evidence with respect to the lack of daily reports by Saddleback project managers on the Buzzsaw system, but decided not to do so. During presentation of Saddleback's case, counsel for Saddleback raised with the court, outside the presence of the jury, the issue of the missing daily reports. Saddleback's counsel first indicated to the court that he planned to call a witness who would "show why . . . the District or the District's reps were not a cause [of] any so called documents disappearing by his review of Buzzsaw." Counsel asserted, "You can go into

Buzzsaw and you can't see what happened in Buzzsaw." After further discussion, the trial court said to Saddleback's attorney, "So go do what you want to do." Saddleback's attorney responded, "Okay. I will leave it alone."

Saddleback could have presented evidence and argument on the issue of the deletion of daily reports from the Buzzsaw system, but ultimately chose not to do so. We therefore reject Saddleback's claim that the trial court erred and caused prejudice to Saddleback by allowing Mepco to introduce evidence that Saddleback had deleted evidence from the Buzzsaw computer system, and by allowing Mepco to argue that point to the jury.

F. *The trial court did not err in awarding attorney fees to Mepco*

Saddleback contends that the trial court erred in awarding Mepco attorney fees. After trial, Mepco brought a motion for attorney fees, costs of suit, and prejudgment interest. Mepco cited as the basis for its requests Code of Civil Procedure sections 998, 1021, 1032, and 1033.5, Civil Code sections 1717 and 3287, Public Contract Code section 7107, and the terms of the performance bond that was part of the Project documents. In ruling on Mepco's motion for attorney fees, the trial court stated, "I definitely feel that attorney's fees are valid in this case under — under statute. And also, under the agreement in this case. I think as has been laid out in the papers, when we have the performance bond and the contract[,] [t]he law is clear that they become one. And I — in fact, I even went to the cases and read them word-for-word, and I am satisfied that that is the situation where the contract bond will be read with the contract. And I went through these cases, and I feel comfortable in saying that."

Saddleback maintains that Mepco is not entitled to attorney fees pursuant to Public Contract Code section 7107 or pursuant to the performance bond and Civil Code section 1717.<sup>23</sup> After the parties completed briefing on appeal, this court requested that they submit supplemental briefing addressing the following two questions:

"(1) If the jury had found Mepco Services, Inc. (Mepco) liable for liquidated damages, and the court had entered judgment in favor of Saddleback Valley Unified School District (the District) on its cross-complaint against Mepco and Hartford Fire Ins. Co. (Hartford), such that the cross-defendants were jointly and severally liable for the liquidated damage award (Mepco under the original construction contract, and Hartford under the performance bond), would the District have been entitled to an award of attorney fees pursuant to the provision in the performance bond that requires Mepco and Hartford to pay any reasonable attorney fees that the District incurs "in connection with enforcement of this bond"?

"(2) If the answer to Question 1 is "Yes," which fees incurred by the District in connection with this action would be recoverable under the performance bond?"

The parties were also instructed to "assume [for purposes of answering the first question] that the trial court determined Hartford's liability under the performance bond as a matter of law, subsequent to a jury determination on the liquidated damages question."

---

<sup>23</sup> Saddleback contends that these are the only two grounds on which Mepco relied in the trial court in requesting attorney fees. Mepco asserts that it also relied on Code of Civil Procedure sections 998, 1021, 1032, and 1033.5. The record demonstrates that Mepco did in fact raise Code of Civil Procedure section 998 as a basis for attorney fees. However, these provisions do not provide an independent basis for awarding attorney fees, but, rather, require the existence of a separate basis for awarding attorney fees pursuant to contract, statute or law. (See, e.g., Code Civ. Proc., § 1033.5, subd. (a)(10).) As a result, Mepco must rely only on its arguments that it is entitled to attorney fees pursuant to Public Contract Code section 7107 and/or the terms of the performance bond, with the reciprocal provision of Civil Code section 1717.

After considering both parties' arguments on appeal, including the arguments in the parties' supplemental briefs, we conclude that the trial court properly determined that it could award Mepco attorney fees pursuant to the terms of the performance bond and Civil Code section 1717.<sup>24</sup>

"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs . . . have been satisfied amounts to statutory construction and a question of law. [Citations.] [¶] Stated another way, to determine whether an award of attorney fees is warranted under a contractual attorney fees provision, the reviewing court will examine the applicable statutes and provisions of the contract. Where extrinsic evidence has not been offered to interpret the [contract], and the facts are not in dispute, such review is conducted de novo. [Citation.] Thus, it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo. [Citation.]" (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.)

The Contract does not include an attorney fee provision. However, pursuant to the Contract, Mepco was required to "furnish a surety bond in an amount equal to one hundred percent (100%) of contract price as security for faithful performance of this Agreement . . . ." In satisfaction of this provision, Mepco obtained from Hartford a

---

<sup>24</sup> In view of this conclusion, we need not address the question whether attorney fees would have been proper in this case based on Public Contract Code section 7107.

performance bond for a penal sum equal to the value of the Contract. This particular performance bond, which was part of the Project documents that Saddleback required as part of its bid package, includes an attorney fee provision that states:

"Contractor/Principal and Surety agree that if the DISTRICT is required to engage the services of an attorney in connection with the enforcement of this bond, each shall pay DISTRICT's reasonable attorneys' fees and costs incurred, with or without suit, in addition to the above amount."

The effect of this provision is that Mepco and Hartford were jointly and severally liable for any attorney fees that Saddleback might incur in prosecuting an action to enforce the bond.<sup>25</sup>

Civil Code section 1717, subdivision (a) provides in pertinent part: "In any action on a contract, where the contract specifically provides that attorneys' fees and costs . . . be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorneys' fees in addition to other costs." "Section 1717 was enacted to establish mutuality of remedy where [a] contractual provision makes recovery of attorney's fees available for only one party [citations] . . . and to prevent oppressive use of one-sided attorney's fees provisions. [Citations.]" (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 (*Reynolds*).)

---

<sup>25</sup> Mepco and Hartford would also be jointly and severally liable for any fees that Saddleback may have incurred in attempting to enforce the bond, even in the absence of litigation.

"Under some circumstances . . . the reciprocity principles of Civil Code section 1717 will be applied in actions involving signatory and nonsignatory parties. [Citation.]" (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 380 (*Real Property*)).) For example, in *Reynolds, supra*, 25 Cal.3d at page 128, the Supreme Court interpreted section 1717 to "provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." Similarly, the reciprocal remedy may be available against a nonsignatory plaintiff seeking to enforce a contract against a signatory defendant if the nonsignatory plaintiff would be entitled to attorney's fees if he were to prevail. (*Real Property, supra*, 25 Cal.App.4th at p. 383.)

In *Leatherby Insurance Co. v. City of Tustin* (1977) 76 Cal.App.3d 678, 690 (*Leatherby*), the court determined that Civil Code section 1717 could transform a bond's unilateral attorney fee provision benefitting the City of Tustin into a provision that permitted the bond principal and/or bond surety to recover attorney fees in an action on the bond. The provision in the bonds at issue in *Leatherby* provided that "in case suit is brought upon this bond by the City [Tustin] or any other person who may bring an action on this bond, a reasonable attorney's fee, to be fixed by the Court, shall be paid by Principal [White] and Surety [Leatherby]." (*Leatherby, supra*, at p. 690.) The *Leatherby* Court determined that the principal or surety could recover attorney fees if "it is the prevailing party" and the action "is an action on the bond." In determining whether

the action was one "on the bond," the court referred to the pleadings, from which it could be "readily . . . determined" that the case had been one "based upon the bond." (*Ibid.*)

Based on Civil Code section 1717 and the case authorities discussed above, we conclude that Hartford and/or Mepco would be entitled to attorney fees for their defense of Saddleback's claim under the performance bond *if* Saddleback would have been entitled to attorney fees for prosecuting its performance bond claim against Hartford and/or Mepco if Saddleback had prevailed on that claim.<sup>26</sup>

We must therefore determine whether Saddleback would have been entitled to its attorney fees if it had prevailed on its performance bond claim. Saddleback argues that it "would not have been able to recover attorneys' fees had it prevailed below" because, according to Saddleback, its performance bond claim "was never tried to the jury below." However, whether a party would have been entitled to attorney fees under a contractual attorney fee provision does not depend on whether that party effectively prosecuted its claim under that contract or whether a jury was asked to reach a verdict on the facts underlying that claim. Rather, the pertinent inquiry for purposes of Civil Code section 1717 is whether that party would have been entitled to attorney fees in a hypothetical

---

<sup>26</sup> Although Saddleback contends that the fee provision in the performance bond cannot be imposed against it because it was not a signatory to the performance bond, Saddleback appears to ultimately concede in its briefing on appeal that the attorney fee shifting provision of Civil Code section 1717 may be imposed on a non-signatory, third-party beneficiary in a situation in which that party would have been entitled to fees if it had prevailed. However, Saddleback contends that in these particular circumstances, it would not have been entitled to fees, and that the fee shifting provision of Civil Code section 1717 therefore should not be applied to hold it responsible for Mepco's attorney fees.

situation in which that party did prevail on its claim. In arguing that it could not have received attorney fees in this case because the jury was never asked to make findings pertaining to its bond claim, Saddleback is simply asserting that under the particular circumstances of this litigation, *it could not have prevailed* on its claim for breach of the performance bond, *not* that it would not have been entitled to its attorney fees under the attorney fee provision in the performance bond if it *had* prevailed.

Rather than look to the jury's verdict for guidance as to whether Saddleback would have been entitled to its attorney fees, we look to the pleadings to determine whether Saddleback's cross-complaint sought "enforcement of the bond," such that it would have been able to recover its attorney fees under bond's attorney fee provision. (See *Leatherby, supra*, 76 Cal.App.3d at p. 690 [whether action was "on the bond," thereby triggering attorney fee provision, could be "readily . . . determined" by reference to the pleadings].) We conclude that Saddleback sought to enforce the bond by way of its cross-complaint. It was Saddleback, not Mepco or Hartford, that invoked the bond by raising the bond in its cross-complaint. Saddleback named both Mepco and Hartford as defendants in the cross-action, and specifically alleged a cause of action for breach of the performance bond as to both defendants. Further, Saddleback specified in its cross-complaint that it was seeking to recover its attorney fees pursuant to the bond.

We conclude that if Saddleback had prevailed on its claim for breach of the performance bond, it would have been entitled to recover the attorney fees that it incurred in prosecuting this action. Therefore, pursuant to Civil Code section 1717 and the cases cited above, Mepco and/or Hartford are entitled to the attorney fees that they incurred in defending against Saddleback's performance bond claim.

Although Mepco and/or Hartford's entitlement to attorney fees incurred in relation to Saddleback's performance bond claim would not necessarily entitle Mepco and/or Hartford to attorney fees related to other claims raised in the case, under the particular circumstances of this case, the attorney fees that Mepco and Hartford incurred in prosecuting Mepco's claims and in defending against Saddleback's claims involved representation on an issue common to Saddleback's performance bond claim. Specifically, by establishing that Mepco had not defaulted under the Contract, Mepco and Hartford defended against both Saddleback's breach of contract claim against Mepco as well as its performance bond claim against Mepco and Hartford.

In order to prevail on its claim to enforce the bond against Mepco and/or Hartford, Saddleback would have had to first establish that Mepco materially breached the Contract, since Hartford's liability as a surety was dependent on Mepco's liability under the Contract. (See Civ. Code, § 2808 ["Where one assumes liability as surety upon a conditional obligation, his liability is commensurate with that of the principal . . . ."]; see also *Pacific Employers Insurance Co. v. City of Berkeley* (1984) 158 Cal.App.3d 145, 151 ["[T]here can be no obligation on the part of the surety unless there had been a

default by the contractor on his contract.' [Citation.]").<sup>27</sup> Saddleback concedes this point in its cross-complaint when it alleges, in support of its performance bond claim, that "Hartford is liable to the District on the performance bond . . . to pay [liquidated damages], as well as any and all other damages or losses sustained by the District *by reason of Mepco's breaches of the Esperanza Contract.*" (Italics added.) A finding of liability against Mepco under the Contract was therefore a *prerequisite* to Saddleback being able to prevail on its performance bond claim. It is readily apparent that if Mepco could defend against Saddleback's claim that Mepco was liable to Saddleback for liquidated damages for failing to meet the completion date in the Contract by demonstrating that *Saddleback* materially breached the contract, thereby either excusing Mepco's alleged default, or entitling Mepco to an extension of time, then the same defense was available to Hartford, as Mepco's surety. (See Moelman, et al., *The Law of Performance Bonds*, Second Edition (2009) pp. 576-589.)

The entire trial in this case was focused on having the jury determine which party had breached the Contract. The jury ultimately determined that it was Saddleback that materially breached the contract and that Mepco had not. These findings meant that Saddleback could not prevail on either of its two claims (i.e., breach of contract and breach of performance bond). Mepco's and Saddleback's breach of contract claims were thus intertwined with Saddleback's performance bond claim. Saddleback had to establish

---

<sup>27</sup> The fact that Mepco's and Hartford's interests were aligned in this litigation is reflected in their decision to have the same attorneys represent both of them throughout the proceedings.

Mepco's liability as a prerequisite to prevailing on a claim on the bond. Therefore, the attorney fees that Saddleback incurred in trying to prove Mepco's breach, and in attempting to overcome Mepco's claims against Saddleback, were, in this case, fees incurred "in connection with" Saddleback's attempt to enforce the bond.

Mepco's breach of contract claim against Saddleback, Saddleback's breach of contract claim against Mepco, and Saddleback's performance bond claim against Hartford and Mepco all revolved around the same central issue, i.e., who was at fault for the delay. Therefore, if Saddleback had prevailed on its claim to enforce the bond, Hartford and Mepco would have been liable to Saddleback for the attorney fees it incurred in litigating all of the claims in this case. Civil Code section 1717 operates to make Saddleback liable for the attorney fees that Hartford and Mepco incurred in defending against Saddleback's prosecution of the action to enforce the bond. Because the question of who was at fault for the delay was central to Saddleback's performance bond claim, Mepco was entitled to the attorney fees that it incurred with respect to that issue as well. The trial court thus did not abuse its discretion in awarding Mepco all of the attorney fees that it incurred in litigating this case below.<sup>28</sup>

---

<sup>28</sup> In supplemental briefing, Saddleback contends for the first time that the trial court abused its discretion in awarding Mepco attorney fees for both prosecuting and defending the entire action, and argues that the court should have apportioned the fees between the fees incurred in prosecuting Mepco's action and those incurred in defending against Saddleback's claim for liquidated damages. As an example of fees that the trial court awarded Mepco that Saddleback claims in its supplemental brief were unrelated to defending against Saddleback's claim for liquidated damages, Saddleback cites fees that Mepco requested for the drafting of its complaint, which was filed before Saddleback filed its cross-complaint for liquidated damages. However, Saddleback did not make this

IV.

DISPOSITION

The judgment of the trial court is affirmed.

---

AARON, J.

WE CONCUR:

---

McCONNELL, P. J.

---

McINTYRE, J.

---

argument in the trial court, and did not raise it in either its opening brief or in its reply brief on appeal. Rather than arguing that some apportionment should occur based on when work was performed and the relationship of that work to defending against Saddleback's claims, Saddleback argued that Mepco was not entitled to *any* attorney fees under the performance bond and Civil Code section 1717. Saddleback failed to present the apportionment argument to the trial court and therefore forfeited this claim on appeal. (See *Premier Medical management Systems, Inc. v. California Insurance Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564 ["General arguments that [attorney] fees claimed are excessive, duplicative, or unrelated do not suffice. Failure to raise specific challenges in the trial court forfeits the claim on appeal."].)